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BY ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Letter, Expanding Flexible Use of the 3.7 to 4.2 GHz Band, GN Docket No. 18-122

Dear Ms. Dortch:

In recent filings in this proceeding, ACA Connects – America's Communications Association ("ACA Connects") has outlined in substantial detail the 5G Plus Plan for reallocation of the C-Band.[1] With these filings, the Commission now has before it a comprehensive proposal to repurpose at least 370 MHz of C-Band spectrum for 5G use that would also deliver a host of additional benefits. ACA Connects files this letter to address major shortcomings in the satellite industry's alternative plans for the C-Band, as embodied in the filings and statements of the C-Band Alliance ("CBA"). These deficiencies have only become more severe and harder to solve as we move into the sixteenth month of this rulemaking proceeding.

First, CBA has intimated publicly that it is "aggressively" working to develop a plan to clear 300 MHz of the band, meaning that all C-Band users, including multichannel video programming distributors ("MVPD"s), would be compressed into the remaining 200 MHz. The promise to commit that showing to the record—a record that still does not contain one word about it—is meaningless. The Commission has already indicated its inclination to act on this proceeding by the end of this year. In "rulemaking time," this is the eleventh hour and fifty ninth minute for radical new ideas to be aired. That timeline would not leave adequate time for interested parties to evaluate and comment on any new CBA spectrum-clearing proposal that may be forthcoming.

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[1] *See* Letter from Pantelis Michalopoulos, Counsel to ACA Connects, to Marlene H. Dortch, FCC, GN Docket No. 18-122, at Attachment (July 9, 2019) ("5G Plus Plan Detailed Proposal"); Letter from Brian Hurley, ACA Connects, to Marlene H. Dortch, FCC, GN Docket No. 18-122, at Attachment (Oct. 7, 2019) ("5G Plus Plan Supplement"). The 5G Plus Plan is backed by ACA Connects, Charter Communications, Inc., and the Competitive Carriers Association.

And CBA's failure to submit its supposed new plan on a timely basis is far from the only problem with its evolving position. CBA would need to explain away its prior claims that 200 MHz is the maximum amount of C-Band spectrum it could possibly refarm. Making things worse still, CBA has had trouble proving to the satisfaction of C-Band users that it could repack them in 300 MHz without causing harm. Yet now it seems intent on jumping from one incomplete task to an even more daunting project.[2] Entertaining this succession of ever more challenging, and ever less complete, showings would be a paradigmatic instance of unreasoned decision-making.

Second, the legal basis for CBA's proposal to reallocate C-Band spectrum through private transactions between satellite companies and wireless carriers is deeply flawed. The Communications Act does not contemplate such a model; on the contrary, it requires that any grant of new licenses to use C-Band spectrum for 5G occur through competitive bidding under the auspices of the Commission, and that the proceeds flow to the U.S. Treasury. To be clear, the statute allows for incumbent licensees to be fairly compensated for transition costs and even to receive incentive payments, and the 5G Plus Plan includes both of these elements. But the notion that satellite companies are entitled to reap the proceeds of a 5G auction, which could exceed $40 billion, is as legally unsound as it is contrary to the public interest.

Finally, CBA is wrong that a private auction of C-Band spectrum orchestrated by CBA would be more efficient than a public auction. Contrary to its assertions, CBA is not uniquely situated to carry out a C-Band spectrum auction quickly after the issuance of an order. The Commission is perfectly capable of matching or beating CBA in speed. Among other things, the Commission has full authority to contract the development and implementation of an auction to a neutral private party, thus securing all the advantages of nimbleness that CBA vaguely claims for its quixotic private sale plan.

I. CBA HAS NOT SUBSTANTIATED ANY PLAN TO CLEAR 300 MHZ OF THE BAND, AND COULD NOT DO SO IN TIME TO MEET AN END-OF-YEAR DEADLINE FOR COMMISSION ACTION

Though it has never proved to the satisfaction of C-Band users that it could clear 200 MHz of the C-Band without causing them harm,[3] CBA has now hinted at the idea that a 300 MHz clearing

[2] This is akin to the landlord telling a tenant: "I know you rent a two bedroom apartment from me, and I would like to partition it. I hear you when you say that a one bedroom apartment is not enough to accommodate your family. So how about a studio?"

[3] *See* Letter from Pantelis Michalopoulos, Counsel for American Cable Association, to Marlene H. Dortch, FCC, GN Docket No. 18-122, at 2-3 (Feb. 12, 2019) ("The reallocation of 200 MHz of C-band spectrum would lead C-band backhaul prices to increase sharply, leading output, choice, and quality to decrease . . . . This dramatic reduction in the capacity of the satellite industry will necessarily result in significant price increases for C-band backhaul because CBA is essentially proposing a merger-to-monopoly: CBA will know the price that 5G operators are willing to pay per C-band MHz, and it is not plausible that its members would not price their

target is feasible. At a recent public event, a CBA official assured the audience that it would soon demonstrate how this clearing process would work, stating that CBA is "aggressively looking at clearing more than 200 megahertz" and that its "effort focuses on using better signal compression technology . . . ."[4] To date, CBA has filed no plan along these lines.

CBA's new plan, if and when it finally comes, will be catapulted in this proceeding at the eleventh hour and fifty ninth minute. The proceeding commenced with a Notice of Proposed Rulemaking more than a year ago, on July 13, 2018. Comments were due on October 29, 2018, and reply comments on December 11, 2018. The Chairman has announced a goal of concluding

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satellite services all the way up to the price 5G operators are willing to pay. In addition, earth station operators would no longer have competitive choices and would be unable to obtain spectrum from another C-band satellite operator because CBA members would be near full capacity."); *see also* Letter from Pantelis Michalopoulos, Counsel for American Cable Association, to Marlene H. Dortch, FCC, GN Docket No. 18-122, at 3-4 (Mar. 25, 2019) ("And, as ACA has explained, even if CBA were right that the same quantity and quality of services is possible, the harm would still be huge, as competitive choices for end users would disappear, coordination among the satellite operators would increase, and prices would go up . . . Mitigation and quantification of the harms is especially important because, in ACA's view, this is not a case where two times the lost spectrum equals twice the harm. ACA believes that the harm from losing 300 MHz is much more than double the harm of losing 150 MHz."); American Cable Association Reply Comments, GN Docket No 18-122, at 13 (Dec. 11, 2018) ("And, even if the Commission simply ruled that the remaining spectrum will be dedicated to satellite use, the satellite operators may well choose to drive prices up because there will be little downside to that strategy.").

[4] *See* Caleb Henry, *FCC Commissioner Defends C-Band Alliance but Renews Call for More 5G Spectrum*, Spacenews (Sept. 25, 2019), https://spacenews.com/fcc-commissioner-defends-c-band-alliance-but-renews-call-for-more-5g-spectrum/; *see also* C-*Band Conference Recap: O'Rielly Says 300 MHz for 5G 'Necessity' for FCC C-Band Approval; CBA Says New Plan Near; Content, NAB Cite Needs, Efforts*, Capitol Forum (Oct. 10, 2019) ("The CBA's 200 MHz clearing target is about to increase, said Peter Pitsch, the group's head of advocacy and government affairs, among the other speakers who appeared after O'Rielly . . . . 'We believe—and we're aggressively looking at this—we can do much better than 200 megahertz,' he said."); *see also* Paul Kirby, *CBA Plans to Soon Unveil More C-Band Spectrum to Repurpose*, TR Daily (Oct. 8, 2019), https://lrus.wolterskluwer.com/news/tr-daily/cba-plans-to-soon-unveil-more-c-band-spectrum-to-repurpose/96615/ ("During an event this afternoon organized by The Capitol Forum, Peter Pitsch, head-advocacy and government affairs for the CBA, said that thanks to 'high efficiency video coding and other compression technologies, we believe, and we're aggressively looking at this, we can do much better than 200 MHz. Paramount to us will be keeping our customers whole. We're not ready yet to say what that amount will be, but it's coming very soon.'").

it with a Report and Order this "fall."[5] This does not leave enough time to evaluate CBA's new theory: other stakeholders would plainly not have the opportunity to evaluate and critique CBA's new proposal. In the words of CBA itself (when criticizing the 5G Plus Plan): "[t]he significant time for the [ACA Connects, Charter, and CCA] Coalition just to explain its proposal coherently provides further evidence that its approach would inevitably result in lengthy delays . . . ."[6] What is good for the goose is good for the gander: the much longer time it has taken for CBA to crystalize its plan suggests, if anything, a longer implementation time. At any rate, the Commission must adhere to the requirements of the Administrative Procedure Act for reasoned decision-making.[7] There is no doubt that CBA has missed its opportunity to file a proposal that the Commission could incorporate into rules adopted by the end of the year.

In any event, there are good reasons to be skeptical that CBA will be able to produce a viable plan to clear 300 MHz of the band. Just months ago, CBA stated that "200 MHz is the maximum amount of spectrum that can be cleared without denying C-Band service to some current customers,"[8] and that "[t]he 200 MHz proposal is the result of months of hard work and analysis with respect to contracted satellite usage requirements and technical mitigation tools."[9]

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[5] *See* Remarks of FCC Chairman Ajit Pai, 8th Annual Americas Spectrum Management Conference, at 2 (Sept. 24, 2019), https://docs.fcc.gov/public/attachments/DOC-359818A1.pdf.

[6] C-Band Alliance Reply Comments, GN Docket No. 18-122, at 3-4 (Aug. 14, 2019).

[7] *See Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 237 (D.C. Cir. 2008) ("It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment."); *see also Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006) ("Among the information that must be revealed for public evaluation are the 'technical studies and data' upon which the agency relies."); *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.").

[8] Letter from Jennifer Hindin, Counsel for the C-Band Alliance, to Marlene H. Dortch, FCC, GN Docket No. 18-122, at 1 (Feb. 7, 2019); *see also* Letter from Jennifer Hindin, Counsel for the C-Band Alliance, to Marlene H. Dortch, FCC, GN Docket No. 18-122, at 1 (July 3, 2019) ("Ms. Hindin and Mr. Pitsch then reiterated the CBA's commitment to clearing 200 MHz (inclusive of a 20 MHz guard band) of the C-band via a market-based mechanism designed to rapidly repurpose spectrum for terrestrial 5G operations in a transparent and efficient manner.").

[9] C-Band Alliance Reply Comments, GN Docket No. 18-122, at 3 (Dec. 7, 2018) ("CBA NPRM Reply Comments").

No doubt the latter statement is true: certain CBA members originally claimed they could only part with 150 MHz (inclusive of a 50 MHz guard band) and that anything more would be unreasonable within an 18-36 month timeline.[10] CBA then committed to clearing 200 MHz within that timeline. Now, CBA is preparing to announce that it could safely clear an amount that exceeds its original spectrum clearing target by more than 50 percent (without any indication as to guard band size and timeline). This would be an extraordinary assertion that would require extraordinary proof. CBA has provided none.

Moreover, in the event CBA does follow through on submitting a concrete plan to refarm 300 MHz of the band, it would need to explain away its prior claims that 200 MHz is the maximum that its members could afford to lose, not to mention earlier claims that 150 MHz was the absolute limit. With each change to its position, CBA finds itself able to accomplish a feat that it had previously deemed impossible. Were these changes, from 150 to 200 MHz, and now from 200 to 300 MHz, attributable to technological advances or great new ideas? That seems unlikely. The shifting positions more likely suggest that CBA's factual assertions in this proceeding are unreliable, and indeed that CBA would say anything that it feels is politically called for in order to allow CBA to maximize its return on spectrum for which it happens to have licenses, substituting itself for the spectrum's rightful owner, the U.S. taxpayer.

II. CBA'S MEMBERS ARE NOT ENTITLED TO APPROPRIATE THE C-BAND AND EXTRACT A WINDFALL FROM U.S. TAXPAYERS

CBA proposes that the C-Band spectrum be repurposed for 5G through private transactions—what it deems "secondary market agreements"[11]—between the CBA members that hold C-Band licenses and the mobile wireless carriers that seek to use the band for 5G. Under this approach, CBA member companies would be expected to rake in massive proceeds—as much as $40 billion by some estimates. The idea that foreign satellite companies would reap such a windfall from the sale of a public resource has raised eyebrows, and no doubt it would be bad policy. It is also worth emphasizing, as several commenters have pointed out, that the proposal is contrary to the Communications Act.

CBA's approach might be plausible if its members held property rights in the spectrum, which they could transfer to other parties for new uses as the new buyers please in exchange for

[10] *See* Comments of the C-Band Alliance, GN Docket No. 18-122, at 5 n.6 (Oct. 29, 2018); *see also* Letter from Karis Hastings, Counsel for SES Americom, Inc., to Marlene H. Dortch, FCC, GN Docket No. 17-183, at 2 (Feb. 9, 2018) ("SES and Intelsat explained that they determined that a target of 100 MHz was reasonable based on analysis of their current fleets and customer requirements. This analysis led the parties to conclude that although the process would be extremely difficult and costly, clearing a target of 100 MHz would be feasible on an expedited basis, making new terrestrial wireless spectrum available to implement 5G services within eighteen months to three years following issuance of a Commission order.").

[11] *See, e.g.*, Letter from Jennifer Hindin, Counsel for C-Band Alliance, to Marlene H. Dortch, FCC, GN Docket No. 18-122, at 1 (Feb. 6, 2019).

payment. But they do not. Specifically, Title III of the Act makes clear that spectrum licenses do not confer property rights. Section 301 of the Act states that its purpose is, among other things, to "maintain the control of the United States over all the channels of radio transmission[] and to provide for [licensing] the use of such channels, but not the ownership thereof." The same section provides that "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."[12] Section 304 also specifies that no station license may be granted until the licensee has "waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."[13] And the Supreme Court has held that "[n]o licensee obtains any vested interest in any frequency."[14] So has the Court of Appeals for the D.C. Circuit.[15]

Indeed, the right and responsibility to license spectrum for new types of services lies not with existing license-holders, but with the Commission. Section 309(j) of the Act generally requires that such licenses be granted through a process of competitive bidding when there are "mutually exclusive applications."[16] CBA seeks to circumvent this requirement by claiming that mutual exclusivity would be avoided by virtue of its proposed private sale.[17] ACA Connects agrees with other commenters that this curious legal theory does not hold water.[18] The examples CBA cites where the Commission has used "various regulatory tools to avoid mutual exclusivity" are all inapplicable on their face to the present situation.[19] In the cases cited by CBA, the Commission modified licenses without conducting auctions for the purpose of allowing the licensee to put the

[12] 47 U.S.C. § 301.

[13] 47 U.S.C. § 304.

[14] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331-32 (1945); *see also Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 394 (1969) ("Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them."); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license.").

[15] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 428 (3d Cir. 2004) ("But broadcast licenses, which are the subject of the Commission's restriction on transferability, are not protected property interests.").

[16] *See* 47 U.S.C. § 309(j)(1).

[17] *See* CBA NPRM Reply Comments at 36-37.

[18] *See, e.g.*, Comments of Competitive Carriers Association, GN Docket No. 18-122 (July 3, 2019); Letter from Elizabeth Andrion, Charter Communications, Inc., GN Docket No. 18-122, at 7-13 (Feb. 22, 2019); Reply Comments of T-Mobile USA Inc., GN Docket No. 18-122, at 24-30 (Dec. 11, 2018); Comments of the Public Interest Spectrum Coalition, GN Docket No. 18-122, at 22-31 (Oct. 29, 2018); Comments of Comcast, GN Docket No. 18-122, at 23-32 (Oct. 29, 2018).

[19] Comments of the C-Band Alliance, GN Docket No. 18-122, at 31-32 (Oct. 29, 2018).

spectrum to more efficient use.[20] Diligent research has not uncovered one instance since the enactment of Section 309(j) where the Commission has refrained from an auction and modified a license in order to allow the licensee to sell it for profit, as CBA contemplates.

By embracing CBA's untested and legally dubious private sale proposal, the Commission would be exposing itself to considerable litigation risk and the very real possibility of a reviewing court overturning its rules and sending the agency back to the drawing board. That outcome would defeat the purpose of expediting deployment of 5G in the band. This is a risk that the Commission should be unwilling to accept.

To be clear, ACA Connects does not begrudge the CBA members being "in the right place at the right time" and reaping some advantage from reallocation of the band. Under the 5G Plus Plan, the satellite operators that hold C-Band licenses would receive compensation for transition costs and lost revenue. They would also receive hefty incentive payments each year in exchange for continuing to provide service to non-MVPD earth station users without price increases. These elements of the 5G Plus Plan are consistent with the Communications Act. CBA's plan, by contrast, would deliver to satellite companies a massive windfall that is not only bad policy, but contrary to law.

III. CBA HAS NOT ESTABLISHED THAT ITS PROPOSED PRIVATE SALE WOULD BE MORE EFFICIENT THAN A COMMISSION-LED AUCTION

Finally, CBA suggests that its proposed private sale could occur far more quickly than the Commission-led spectrum auction that the 5G Plus Plan contemplates.[21] Recently, CBA has argued that "the current auction backlog and complexities of the C-band ecosystem would add significant delay to an FCC-run public auction for the C-band spectrum" that its approach would avoid.[22] But the Commission is fully capable of running an efficient auction. Among other things, CBA's assertions ignore the fact that the Commission has the authority to contract out the

[20] *See* Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands, *Order on Reconsideration*, 33 FCC Rcd. 8435 (2018); *see also* Improving Public Safety Communications in the 800 MHz Band, *Report and Order*, 19 FCC Rcd. 14969 (2004).

[21] *See* Letter from Henry Gola, Counsel for C-Band Alliance, to Marlene H. Dortch, FCC, GN Docket No. 18-122, at 1 (June 10, 2019) ("At the meeting, the CBA Parties reiterated that the CBA proposal to clear 200 MHz (inclusive of a 20 MHz guard band) of C-band spectrum within 18-36 months of a final FCC order remains the fastest, most efficient way to transition a substantial amount of mid-band spectrum to terrestrial 5G mobile service, while providing uninterrupted service to existing customers.") ("CBA June 10 *Ex Parte* Letter").

[22] *See* Letter From Peter Pitsch, C-Band Alliance, to Honorable John Kennedy, Chairman, and Honorable Christopher Coons, Ranking Member, Senate Appropriations Committee, Subcommittee on Financial Services and General Government, at 3 (Oct. 17, 2019), https://c-bandalliance.com/wp-content/uploads/2019/10/CBA-Cover-Letter-to-Senate-Approps-10-16-19.pdf.

design and implementation of an auction to a neutral third party, which would allow the Commission, along with the neutral third party to which it has delegated authority, to run an auction as fast as, or faster than, CBA can.

Specifically, the Act provides that "[t]he Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding . . . ."[23] The auction provision also specifies that "the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection."[24] As the Commission has explained when submitting estimates to Congress, "Section 309(j) of the Communications Act permits the Commission to utilize funds raised from auctions to fund auctions purchases, including contracts for services, and personnel performing work in support of Commission auctions authorized under that section."[25] And the Commission has in fact used that authority to contract out the design and implementation of auctions.[26] The Commission has also relied on its ancillary authority under Section 4(i) to appoint a transition administrator and may use that authority, too, to appoint a neutral auction facilitator.[27]

As a newly established entity with limited staff, CBA presumably does not have the necessary in-house expertise and resources to conduct a "private auction," and would need to procure this expertise and these resources from third parties itself. It is also far from clear that CBA, standing in for the Commission, could avoid the current auction backlog any better or perform auction-related tasks more efficiently or more competently than an expert auction firm performing these duties itself under the Commission's auspices. Nor is it true by any stretch of the imagination that CBA's proposed "FUEL" auction model avoids complexity,[28] especially in comparison to a single forward auction of the type typically utilized by the Commission.

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[23] 47 U.S.C. § 309(j)(3).

[24] 47 U.S.C. § 309(j)(8)(B).

[25] Fiscal Year 2016 Budget Estimates, Federal Communications Commission, at 26 (Feb. 2015), https://docs.fcc.gov/public/attachments/DOC-331817A1.pdf.

[26] FCC Announces Paul Milgrom and Other Leading Auction Experts to Advise Commission on Incentive Auction Design and Implementation, FCC (Mar. 27, 2012), https://docs.fcc.gov/public/attachments/DOC-313242A1.pdf ("Today, the Federal Communications Commission announced the retention of leading experts in auction theory and implementation, one of its first significant steps to implement new incentive auction authority passed by Congress in late February. The advice of prize-winning auction and IT experts from Auctionomics, Power Auctions and MicroTech will serve as valuable input to the Commission as it moves forward to design and implement incentive auctions.").

[27] 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

[28] *See* CBA June 10 *Ex Parte* Letter at Exhibit B.

There is thus no certainty that a newly established entity with no experience administering auctions could carry out a complex auction seamlessly and without unexpected complications. At any rate, CBA's proposed auction model is inextricably tied to its proposal that new C-Band licenses be granted to wireless companies through a process of private negotiation. Because that approach is fatally flawed, the Commission must reject CBA's private auction scheme as well.

IV. CONCLUSION

In short, CBA's proposals for the C-Band are unlawful and contrary to the public interest. ACA Connects encourages the Commission to refrain from moving forward with adoption of any such proposals.

Respectfully submitted,

/s/_____
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